No. 814

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

C. H. SOUTHER, ET AL.,
Appellants,

VS.

SAN DIEGO FLUME CO.,
Appellee.

BRIEF OF APPELLEE

WORKS, LEE & WORKS,
Counsel for Appellee.

Filed Mar 1902

Clerk

Records of Ci

Court of appeals

191

IN THE

CIRCUIT COURT OF APPEALS OF THE UNITED STATES

NINTH CIRCUIT

C. H. SOUTHER, ET AL.,
Appellants,
vs.
SAN DIEGO FLUME CO.,
Appellee.

STATEMENT OF THE CASE.

This action was brought by the appellants originally to set aside and cancel a contract between them and the appellee, by which they purchased from the appellee a water right to fifteen inches of water, to be supplied from the system of the Company, and to recover damages in the alleged sum of $6500.00 for the failure of the Company to furnish them the amount of water agreed by the contract to be furnished. The appellee filed its answer, and also a cross complaint, setting up the same water right contract, asking for a decree in its favor for the amount agreed to be paid by the appellants, and to foreclose that contract against the real estate described therein which was to be supplied by the water furnished. The Circuit Court held that the water right contract was void, on the ground that the Company had no power to make such a

contract, and further, that the contract being void, no action could be maintained by the complainants in the action to rescind or cancel the contract, and both the bill and the cross bill were dismissed. The complainants in that action, the appellants here, bided that decision, and took no appeal. The defendant in the action, the appellee here, appealed from the decree rendered, and the same was reversed.

San Diego Flume Co. v. Souther, 90 Fed. Rep. 164.

On the appeal in this Court, the position was taken and argued by counsel that sufficient ground was shown for a rescission of the contract, and that the facts were competent to be urged against the appeal under the answer to the cross complaint, although no appeal had been taken by them from the decree dismissing their original bill. This Court, acting upon that claim of theirs, held upon the merits that there was no ground for a rescission of the contract.

This would seem to settle the question now urged on this appeal, that the appellants were not entitled, on the re-trial of the case, to a rescission of the contract. Upon the case coming down, it was fully re-argued in the Circuit Court, both orally and upon printed briefs, and a decree rendered by the Court in favor of the appellees for the amount agreed to be paid by the water right contract. This appeal is taken from that decree, and errors without number, almost, are assigned. But we submit that as to almost all of the questions attempted to be raised by the assignment of errors, the appellants are foreclosed by the former decision of this case by this Court, and by the fact that no appeal was taken by them from the decree of the Court dismissing their bill to rescind and cancel the contract. Certainly they can not, under their answer, and the decree having been rendered against them on their bill, have a cancellation of the contract sued upon by

the appellees. There was a decree rendered against them on that question, and no appeal having been taken, the decree became final. Under their answer, they could do no more than defend against the allegations of the bill and could not have affirmative relief. This, we submit, left open to them nothing but the simple question of the amount of damages, if any, to which they were entitled under their answer. But as they contend to the contrary, it may be necessary for us to burden the Court with another argument of the same questions that were argued and submitted upon the former trial as to their right to a rescission of the contract, assuming that they were in condition, under the pleadings, to insist upon any such remedy.

ARGUMENT.

We submit, at the outset, that the appellants have no standing in this Court, and had none in the Court below, to call for relief by way of a rescission of the contract sued upon in the cross bill. They had brought their suit to rescind the contract, alleging the grounds therefor in their bill. The Court below, on the first hearing of the case, dismissed the bill, and no appeal was taken by them from that decree. That decree must, therefore, stand as conclusive against them. But on the first appeal to this Court, they argued that question upon its merits, and insisted that they were entitled to a rescission of the contract, and this Court decided it upon its merits, and with respect thereto said:

"This suit was brought to cancel a written instrument. In order to authorize the court to grant the relief prayed for, facts must be alleged which show the necessity for the equitable interference of the court. In this case it is not alleged that the contract was procured by fraud or duress, or that it was entered into by the mistake of either party. No facts are shown in the bill or in the evidence from which it may be inferred that the written contract is a menace to the complain-

ants, or that there is danger that it may be used tortiously or oppressively by the defendant to their injury. In 2 Pom. Eq. Jur., Sec. 914, the principle governing this class of cases is thus stated:

'The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain and complete.

In Insurance Co. v. Reals, 79 N. Y. 202, it was said of the powers of a court of equity:

'Such a court will not interfere to decree the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is able to avert.'

Of similar import are the decisions in Ryerson v. Willis, 81 N. Y. 277; Johnson v. Murphy, 60 Ala. 288; Insurance Co. v. Bailey, 13 Wall. 616; Kimball v. West, 15 Wall. 377; Atlantic Delaine Co. v. James, 94 U. S. 207; Blake v. Coal Co., 22 C. C. A. 430, 76 Fed. 624.

Viewed in the light of the authorities, there was clearly no error in dismissing the complainants' bill."

But aassuming that that question is still open for determination on this appeal, we again submit that no ground whatever for the rescission of the contract was shown.

It is important, therefore, that we should look to the issues formed by the cross bill and answer thereto, for that is what is now presented for determination. This is particularly necessary because the learned counsel for the complainant seem to to have argued pretty much everything except the real and only questions presented. They have argued the case upon the theory that, under the issues, the contract in question here must be treated as the only one ever made by the defendant, except the one previously made with the complainants, for a like quantity of water, and that the defendants failed and refused to supply *any* water to the complainants, thus, showing

a total failure of consideration for their promise to pay for the water right. And following this statement of the questions involved, and their arguments founded thereon, they proceeded to maintain, as best they can, that, therefore, they had the legal and equitable right to treat the contract as rescinded, pay nothing, and recover large damages besides. Let us see, at the outset, whether the premises from which they draw their conclusion actually exist.

And, first, can the case be treated as though the defendant had made these two contracts, only, and is in no manner bound to supply other consumers under its system or protect them, in common with the complainants, from loss, in case of shortage of water, by conserving and distributing the water to the best interests of all consumers concerned? If this be so, it must be shown by the allegations of the pleadings and the evidence, and the proper application of the law to the facts alleged and proved.

The cross bill alleges that the defendant was organized and empowered to appropriate, furnish and supply water to others for irrigation and domestic use in the County of San Diego; that it owns a flume and aqueduct by which it conveys, and heretofore conveyed, the waters it impounds, stores and diverts, to and upon the El Cajon Rancho for distribution among consumers of water for domestic and irrigating uses; that on the 12th day of March, 1890, it entered into a contract with the complainants by which it sold and conveyed to them a water right for fifteen inches of water, perpetual flow, for nine thousand dollars. The contract is set out in the cross bill in full, and amongst other things, in addition to the conveyance of the water right, contains these covenants and conditions:

"The party of the first part covenants and agrees for itself,

its successors and assigns, to furnish, subject to restrictions and conditions herein contained, a continuous flow of water, equivalent to 12,960 standard gallons in every twenty-four hours for each inch of said fifteen inches of water, Miner's measure, under a four-inch pressure, hereby conveyed, subject always, however, to such reasonable general rules and regulations as the said corporation may from time to time adopt.

Provided, however, that if said corporation's supply of water be at any time shortened, or its capacity for delivering the same impaired, by the act of God or by the elements, or by drought or the failure of the average amount of rainfall in the mountains, or by operation of law, riot, insurrection, or public enemies, or by accident or wilful injury to any part of its system of water works, the above described land and the lands to which said ten inches of water, or any portion thereof, may be attached, as hereinbefore provided, shall, during the period of such shortage or impairment, be entitled to only such water as can be supplied to and for it after the full supply shall have been furnished to all cities and towns that are or may be dependent either in whole or in part upon said system of waterworks for their supply of water for municipal purposes and for the use of their inhabitants.

And the said party of the first part shall not be responsible for any deficiency of water occasioned by any of the above causes, but the party of the first part shall use and employ all due negligence at all times in repairing and protecting its said flume and in maintaining the flow of water therein."

Record p. 33.

It is further alleged that, pursuant to law, the board of supervisors, on the 9th day of January, 1891, on the petition of the requisite number of citizens of the County, fixed and established the annual rates to be charged by the defendants for water supplied to its consumers. It is further alleged:

"That during the winter of 1893-94 and the summer of 1894 a severe and prolonged drought prevailed throughout the said County of San Diego, and covering the entire watershed of your orator, and there was a failure of the average amount of rainfall in the mountains from which your orator obtained its water supply; and by reason of said drought and

failure of the average amount of rainfall, and for no other reason, your orator was, without fault or neglect on its part, unable to supply to the consumers of its water, and to whom it had become liable to furnish water, the full supply to which they were entitled, and by reason thereof, and for no other or different cause, your orator duly notified all consumers, including the defendants, that in order that all might suffer as little as possible from the scarcity of water, the supply to be furnished to all consumers during the continuance of said drought would be reduced one-half; and, in pursuance thereof, the gates connecting the flumes and pipes of your orator with the pipes and flumes of consumers, including the defendants herein, were so set and maintained as to furnish during said time, only such one-half of the full supply of water; but that immediately upon said drought being broken, and as soon as your orator was able to do so, it gave notice to all said consumers, including the defendants, that it was ready to and would again furnish the full supply of water."

Record, p. 35, par. 10.

The notice served is set out in full. It is further alleged that from that time on the defendant was ready, able and willing to furnish a full supply of water to the complainants and all other of its consumers, but that the complainants refused and ever since have refused to receive it, and so notified the defendants, and followed it by a notice of rescission of the contract. Following this is this allegation:

"But your orator shows to your Honorable Court, and alleges the facts to be, that there has not been an entire failure of the consideration for the obligation of said defendants to pay the sums of money agreed by said contract to be paid, or even a partial failure of said consideration, and that there has not been, at any time, an entire or total or partial failure or inability of your orator to furnish and supply, in accordance with said contract, the said fifteen inches of water since on or about the 7th day of June, 1894, as asserted in said last-named communication, but that it has, at all times, furnished to the said defendants the supply of water provided for in said contract, and in strict compliance therewith, and that it has not failed except during the drought aforesaid.

and in the manner, during the time and for the reason above set forth, to furnish the full supply of said water, and that its failure to furnish said full supply during said time is authorized by said contract."

Record, p. 41.

Then follows the general allegation of full performance by the defendants and failure to perform by the complainants, and the amount due under the contract.

See Cross Bill, Record, p. 41, par's. 12, 13.

If we apply the denials and allegations of the answer of the complainants to the issues presented by the cross-bill, there can be no difficulty in arriving at the real questions presented.

By the answer it is admitted that the defendant is organized for the purpose of engaging, and is actually engaged, in supplying water to the public, and it is expressly averred that its only rights in the water it has appropriated "were acquired by it as an appropriator under the constitution and the statutes of the State of California, and the Acts of Congress of the United States."

Record, p. 62.

So this contract can not be treated as an ordinary contract between private individuals and irrespective of the duties and obligations of the defendant to *all* of its consumers.

We need not take up time with the admissions and denials relating to the fixing of rates by the board of supervisors.

The answer admits as follows:

"10th. They admit that during the summer of 1894 a drought prevailed throughout the said county of San Diego, covering the entire watershed of cross-complainant, and that there was a failure of the average amount of rainfall in the mountains, from which cross-complainant obtains its water supply."

Record, p. 65.

This is followed by a denial that because of the drought, or failure of the average rainfall, "and for no other reason," the cross complainant was "without fault or neglect on its part," unable to supply the full quantity of water to its consumers, or that, for that "and for no other reason" it notified its consumers that the quantity of water supplied during the drought would be reduced to one-half.

It is admitted that the complainants were so notified and that the gates through which they were supplied with water were so set and adjusted as to furnish them a half supply. They deny, for want of knowledge on the subject, that other consumers were similarly treated.

They likewise deny that on the 8th day of December, 1894, the defendant gave notice to *all* its consumers of its readiness and ability to again furnish a full supply of water, but admit that such a notice was given the complainants.

They deny, on information and belief, that from the 10th day of December 1894, the cross complainant was again ready to supply the complainants with the maximum quantity of water to which they were entitled, but admit that it offered, then, to furnish them their full supply of water, but they refused to receive it, and in response to such notice, two days later, gave notice of their refusal, and allege that on the 2nd day of October, 1894, they gave notice of the recission of the contract and that since that date they have refused to accept the water, and have treated the contract as at an end. They deny, in general terms, that the cross complainant has "at all times," furnished complainants a full supply of water except during the time of drought, or that its failure to supply the water was justified by the terms of the contract. Their specific denial is as follows:

"12th. They deny that cross-complainant has fully, or

otherwise, in all things, or in any of them, complied with and performed all or any of the terms or covenants or conditions of said contract of March 12th, 1890, on its part to be done, or performed, *except that it furnished 15 inches of water thereunder up to June* 7th, 1894."

Record, p. 68.

They further allege that the defendant's system did not have a capacity of more than 375 inches and that it had contracted to furnish over 600 inches, and to supply the Indian Reservation, and between January 1, 1894, and sometime in July, it had wrongfully furnished not less than 1,500,000 gallons of water to the San Diego Water Company, because it could get a higher price therefor than was being paid by other consumers, or from the complainants under their contract, and further:

"And defendants further aver, on information and belief, that by reason of the said cross-complainant having, prior to October 2nd, 1894, sold and tried to furnish more water, for compensation, than it had the capacity to supply, and for no other reason, the cross-complainant was unable to, and failed to furnish the defendants, *from June* 7th 1894, until October *2nd*, 1894, with their 15 inches of water, under said contract of March 12th, 1890."

Record, p. 70.

They admit their failure to pay the principal sum privided by the contract to be paid for the water right, and interest thereon from the 1st day of May, 1894, together with the annual rental for the water used from the 1st day of December, 1894, but deny that the said items or any of them are due and allege that " they were not paid for the reason that said contract was ignored and abrogated by the cross-complainant *on and after the 7th day of June*, 1894."

Record, p. 71.

This is followed by allegations showing the damage result-

ing to the complainants, by reason of the facts alleged, but adding nothing to the averments above referred to, affecting the questions to be determined, and alleging their damages to be $6,500.00.

The answer contains no prayer for the rescission of the contract or for damages.

See Answer to Cross Complaint, Record, pp. 61-77.

To this answer the usual replication was filed.

These are the issues upon which the case is now here. The pleadings show that the defendant company was a corporation supplying water to the public, including the complainants; that the complainants purchased the water right on the 12th day of March, 1900; that they had received their full supply of water from that time until the 7th day of June, 1894, when their supply, in common with all other consumers, was, on account of the severe drought of that year, reduced to one-half, and that quantity, only, furnished until December 10th, 1894, when the defendant company announced its readiness and ability to supply the full quantity of water but the complainants refused to receive it and gave notice of rescission of the contract; and that complainants had paid no part of the principal sum agreed to be paid for the water right and no interest since May 1st, 1894.

So it is undisputed that before any breach of the contract by the company, conceding there was a breach, the complainants had enjoyed the full benefit of the water right contract from March 12th, 1890, to June 7th, 1894, a period of *four years and three months*, lacking five days, for which they have paid nothing. Then from June 7th to December 10th, a period of *six months*, and three days, the company furnished only one-half of the full supply of water to which the complainants

were entitled, if the effects of the drought furnished the company no excuse for the failure to supply the full amount.

And in addition to this the full amount of damages alleged to have resulted to the complainants from the alleged breach of the contract was only $6,500, or $2.500 less than the principal sum due for the water right saying nothing about the accrued interest. Not only so but *after* the alleged breach, from and until the end of that irrigation season, when other consumers were needing the water, the complainants continued to accept and use the one-half of the water under the contract, the same as the other consumers were receiving water, and now repudiate all liability to pay for it.

It is upon this state of facts that counsel for complainants appeal to this, a court of equity, to rescind the contract and relieve them from all liability to the company.

But we have, so far, only called attention to what is alleged in the pleadings. It is equally as important, in view of the position taken by counsel, to notice what is omitted from the pleadings. They maintain that, under the law of this state, the doctrine " first in time, first in right" must prevail, as between takers of water from a company like this. This we will discuss farther along. But, to enable them to invoke this doctrine they must, necessarily, allege the facts showing their priority in time. This has not been done. Admitting everything that has been alleged in their answer it may be true that theirs was the last contract of any for water to be furnished by the company. They made this contract. They are alleging its breach. Therefore they must allege and prove such facts as will establish their legal right to the full amount of water where there was an admitted shortage resulting from the drought from which some of the consumers must suffer. They

for some reason were careful to prove other contracts prior in time to theirs.

Record p. 244.

Again they allege the conclusion that water was furnished to the San Diego Water Company, in violation of their right to it, but there is nothing to show that their right to the water was in any way superior to that company. Indeed, so far as their answer shows, the San Diego Water Company might have been entitled to all of the water, in preference to them, particularly if their doctrine of priority of right, according to time, is to prevail.

So much for the pleadings. It is proper that in making this statement we should also refer briefly to the evidence. It must be remembered, however, that this evidence was taken on the issues as they were formed by the bill of complaint and answer as well as the cross bill and answer thereto. Then, an issue of rescission of the contract was presented. Now, it is not. The only question that is presented is one of damages for an alleged breach of the contract. But the evidence clearly shows that the defendant was engaged in supplying water to numerous takers from its system, for irrigation and domestic use. That for a part of the year its water was supplied by flowing streams, but for the latter part of the summer season it was dependent, for its supply, upon water stored in its reservoirs, the main one of which was in the mountains, the water being carried and distributed by means of a main flume and pipe line extending from the reservoir to the City of San Diego. It is shown by a clear preponderance of the evidence that the capacity of the storage system and flume of the company, of an ordinary, or average year, was not less than 700 inches.

The evidence clearly shows that the failure to furnish the

full supply of water during the summer of 1894 was the result of the causes mentioned in the contract as excusing the defendant from liability therefor.

See testimony of Mr. Doolittle, Record, pp. 263, 265, 267, 268, 269.

In this testimony the reason for the failure to furnish the water is clearly stated. The fall of rain only amounted to 14.55 inches, and was less, by fifty per cent. than any previous recorded rainfall.

Record, p. 269.

And this was the only time, before or since, that the defendant has been unable to furnish the full supply of water to all its consumers.

Record, p. 271.

There is other evidence, showing clearly that it was the unprecedented drouth that prevented the defendant from complying with its contract, but this is an undeniable and an undisputed fact, and we need not trouble the court with further reference to the evidence on that point. And counsel do not claim to the contrary. They make two points only: a. That the defendant had, in the first place, sold and obligated itself to furnish more water than it had the capacity to supply, and b. It was not furnishing water to the City of San Diego but to the San Diego Water Company for the city. As to the first of these counsel clearly misstate the fact. The testimony to the effect that the defendant was unable to supply the water it had obligated itself to furnish, during an average year is purely theoretical, and expert, which means much the same thing in a case of this kind. But the positive and undisputed evidence is, that the defendant always *has* been able to furnish all the water demanded and has, in fact, furnished it, both before and since the summer of 1894, and was only prevented

from doing so that year by the extreme and unprecedented drouth.

Mr. Doolittle, secretary of the defendant, says in his testimony:

"Q. I understand you that notwithstanding the fact that you did cut down the supply of your consumers, and in that way decrease the draught from the reservoirs, that on account of the drouth that year the quantity of water was reduced below what it was at any other time during the history of the company?

"A. It was.

"Q. *Has there been any other time since the Flume Company commenced to supply water to its consumers, that it has been compelled to, or has, on account of scarcity of water, cut down the supply to consumers?*

A. *They never have reduced the supply, on that account at any other time.'*

Record, p. 271.

See also the testimony of Mr. Hearne, observer weather bureau, Record, pp. 410, 412.

And of Mr. Schuyler, pp. 420, 422, 429, 431.

There is no evidence to the contrary.

But, in addition to this the undisputed evidence shows that the total number of inches sold is only 537 1-20 inches, up to the date of taking evidence in this case, and that the number of inches *in actual use,* at that time, was only 326.71 inches and that there were even less sold and in use in 1894.

Record, pp. 271-277.

The water sold to the Junipero Land and Water Company is not included, as it is fair to presume that no one would demand water, at the price named in its contract, viz: 10 cents per thousand gallons.

Record, p. 275.

This is the evidence as to the quantity of water the defendant is obligated to furnish. The evidence that it is able to supply it,

aside from the positive proof that it has always done so, is equally convincing.

The quantity of water upon which the defendant has made its filings is shown.

Record, p. 324.

And the reservoirs already constructed are enumerated.

Record, pp. 326, 327.

And that it has the construction of other reservoirs in contemplation and partially provided for when the demand for water calls for them.

Record, pp. 327, 328, 341, 371.

And that the flume has been so constructed as to carry a much larger supply of water, when needed, by merely putting on additional side boards.

Record, pp. 329, 330, 331.

And that the flume as now constructed has been found sufficient to supply all water demanded except during the summer of 1894.

Record, p. 330.

And that the additions to the system now contemplated, and for which surveys have been made, will increase the capacity of the same to over 5,000 miner's inches perpetual flow.

Record, p. 334.

As we have seen, the quantity of water actually sold by the defendant, excluding the Junipero's contract was 537 inches, and the amount actually demanded is only 326.71. So the question is whether, at the time the complained of shortage occurred, the defendant was able, with the water and system it then had, to furnish the water actually demanded, of an average or ordinary year. That it was so able is clearly proved. Mr. Hyde, the engineer of the defendant gives the capacity of

the Cuyamaca reservoir, alone, as 490 miner's inches, perpetual flow.

Record, pp. 370, 371.

And the reservoir is only drawn from during the time from sometime in June to sometime in December.

The balance of the year the water was drawn from the natural flow of the streams.

Record, p. 310.

The engineer gives the carrying capacity of the flume of the company, as between 700 and 800 inches.

Record, p. 374.

And says that if placed exactly on grade it would carry 900 inches.

Record, pp. 374, 375.

Mr. Schuyler gives the carrying capacity of the flume, as it existed in 1894, as 900 inches, reduced to probably 750 inches by the flume having settled in places.

Record, p. 418.

And says, allowing for leakage and evaporation,, its actual duty was in excess of 700 inches.

Record, p. 418.

He also says that the Cuyamaca reservoir would supply 495 inches from June 1st to January 1st, which is a longer time than it is drawn from, as shown above, making proper allowances for evaporation and other losses.

Record, p. 419.

This is in case the reservoir is filled to the 31-foot contour line, which as shown by Mr. Doolittle's testimony is always the case where there is an average amount of rainfall.

Record, p. 252.

And every year except 1894, within three or four inches of it.

As against this we have the testimony of Mr. Harris, an expert, that the capacity of the flume is 620 inches, which is sufficient for our purpose. But he makes deductions from various causes which reduces the amount to 228 inches.

Record, pp. 182, 183.

Which is so grossly exaggerated as to render the testimony of the witness wholly worthless. It is a little singular that the testimony of this witness should ever have been taken when the complainants contend that the defendant has sold, and has actually been delivering, through this same flume, nearly 500 inches of water, and the evidence shows conclusively, that the flume, the capacity of which must be the same whether the season has been a wet or a dry one, has actually been delivering 326 inches right along, as we have shown above.

The witness shows himself to be both an interested witness and an utterly unreliable one.

Record, pp. 191, 195, 205.

He gives the capacity of the Cuyamaca reservoir, without deductions for evaporation and other causes, at 547 inches perpetual flow.

Record, p. 188.

Mr. Alverson, another of their expert witnesses, gives the actual practical capacity of the flume as about 550 inches.

Record, p. 221.

And the capacity of the Cuyamaca reservoir at 550 inches perpetual flow.

Record, p. 223.

And after all deductions for evaporation and other losses, which no one can reasonably deny are excessive, he makes the actual duty of the reservoir, for 180 days, 225 inches, per-

petual flow, and 450 inches during the time the reservoir is actually drawn from, and longer, of 450 miner's inches.

Record, pp. 229, 230.

So, according to their own witnesses, the actual ability of the system was largely in excess of the demands made on it, which as we have shown, amounted to only 326 inches. Not only so, but it shows its capacity to be sufficient, of an average year, to supply the total amount contracted for without any additions to the system. But the company is only bound, in making additions to its system, to keep pace with the actual demands of its consumers. To add to its system, unnecessarily, would only impose an additional and useless burden, both upon the company and its consumers. And the evidence shows that with its present expenditure the company is entitled to demand $120 an inch, annual rental, for its water. The board of supervisors have so adjudged, and that rate has been legally established.

See defendants' cross bill, p. 35, Record, p. 323.

And the acceptance of a less sum by the defendant is a pure matter of grace.

To construct this plan the company has been compelled to issue bonds in the sum of $663,000 and the stockholders have put in of their own money nearly $600,000 more.

Record, p. 332.

It has actually cost over a million and a half dollars.

Record, p. 331.

And all that the company has been able to realize, from this large expenditure, including money received from the City of San Diego, is $45,000 per annum, and nearly half of this comes from the city.

Record, pp. 331, 332.

It would be very poor policy as respects both the company

and the consumers, to add to this large expenditure until there is such a demand for water as to call for it. When the demand comes, the company has an ample supply of water. It is, as Mr. Harris, their witness, says, a mere matter of providing storage for the water.

Some stress was laid upon the fact that the defendant was obligated to furnish a large amount of water to the Indians on their reservation, and a contract, purporting to have been made with the government, to that effect, was introduced in evidence.

Record, p. 478.

But, while such a contract was formally executed, between the defendant and the Indian agent, it never was accepted by the government.

Record, pp. 473, 474.

And if such contract had been made the whole amount of water called for, or used by the Indians, is shown to be only about *two inches*.

Record, pp. 259, 275.

We submit that there is no foundation for the first point, lettered "a."

As to the second point made, it seems to us to be utterly frivolous. The contention is that the water of the defendant was not furnished to the City of San Diego, but to the San Diego Water Company *for* the City of San Diego. This is a distinction without a difference, so far as the merits of this case are concerned. One of the purposes of the organization of the defendant was to supply water to the city of San Diego.

Record, pp. 355, 356.

In its contract with the complainants it was expressly provided that in case of a shortage in the supply of water the City of San Diego, in case the city was "dependent in whole

or in part" upon its system of water works, should have the preference.

See quotation from contract above.

That the City of San Diego was very largely dependent upon the defendant's supply of water, and that some of the people actually suffered for water when the supply was cut off, for the benefit of the complainants, and its other country consumers, is fully shown.

Testimony of Mr. Flint, Record, pp. 354-358.

Barbour's testimony, Record, p. 242.

It is an undisputed fact in the case.

Now, what difference could it make whether the water thus needed was furnished to the city directly or through the agency of another company, having a distributing system within the city limits, thus avoiding the unnecessary expense of putting in such distributing system. But, as a matter of fact, the defendant was furnishing the water directly to the city, and the San Diego Water Company was acting merely as its agent for that purpose. It was so provided by a written contract between the two companies.

Record, p. 345.

And in connection with this contract, and as a part of it, another agreement was made providing for the keeping of the accounts of sales of water, expenses, and a division of profits between the two companies.

Record, p. 346.

The Flume company attempted to escape from this contract, but failed.

Record, p. 313.

San Diego Water Co. v. *San Diego Flume Co.*, 41 Pac. Rep., 495.

This contract is still in force but instead of the cumbersome

methods of keeping the accounts, under the supervision of trustees, an amount to be paid the Flume Company has been agreed upon, which simplifies their dealings and avoids unnecessary expense.

Record, p. 278.

But while the defendant had the clear legal right, under its contract with complainants, to continue to furnish the full supply of water to the City of San Diego, it did not do so. It did everything in its power to protect its consumers in the emergency.

It gave notice to the water company, and to the city, that the resources of the water company must be resorted to, to supply the city, and the supply from the defendant's system would be shut off. It pursued this policy, and withdrew the water from the city, just as soon and as rapidly as it could be done, without causing actual distress, and the water company was driven to the most extraordinary measures in order to supply the city at all and was then only able to supply it very inadequately.

See Mr. Flint's testimony, Record, p. 354, 358.

Mr. Doolittle's testimony, p. 270.

Barbour's testimony, p. 239.

The exact dates when the water was shut off from the city, and the amounts furnished, are stated in the defendant's answer to the bill, and the allegations made with reference to this matter are undisputed, the only contention of the complainant being that the water was not furnished to the city, but to the San Diego Water Company, for the city.

The only reliance the complainants seem to have, in support of their contention that the defendant's water supply was not sufficient, in an average year, is a letter written by Mr. Barbour, its vice-president, to its president, Mr. Sefton. But

the letter was not written in an average year, but was the outgrowth of the very shortage of water that was all too real and apparent that year. The writer was evidently badly affected by the drouth. He was, in common with many other people, crying for more water. He was an advocate of consolidation, and was trying to convince his superior that the emergency was at hand that demanded that something should be done in that direction. But the letter proves nothing at last. The contention that the defendant had violated the contract is wholly unsupported by the evidence and entirely unfounded in fact.

It will not be seriously contended, we think, that there was any such want of care or negligence on the part of the defendant, in the management of its system, as would entitle the complainants to recover. Some small leaks in the flume are shown, but they are insignificant, and such as will always be found in such a structure.

Record, pp. 416, 417.

With this review of the evidence we may pass to a consideration of the questions of law involved, and,

I.

THERE IS NO REASON SHOWN, BY ALLEGATION OR PROOF, FOR RESCINDING OR CANCELLING THE CONTRACT.

The question was argued in our brief on the first hearing, when the original bill was in, and the question of rescission was presented for decision. Counsel contend that the question is still here and a rescission may be had under their answer. We have shown above, we think, that this cannot be so, but the court may take a different view of it and in order that our views may be properly presented we incorporate in

this brief what we said on the former hearing. There are certain material and salient facts disclosed by the pleadings, as they originally stood, and by the evidence now before the court, taken under the issues as they were originally made up, to which we desire to call your attention. They are:

1. That the complainants had *two* contracts with the defendant, each of which called for and entitled them to receive from defendant's system, *fifteen* inches of water, contiuuous and perpetual flow or thirty inches under both contracts.

2. That with respect to the contract sought to be rescinded the complainants had paid no part of the principal sum of $9,000 agreed by them to be paid for the water right.

3. That the defendant was compelled, by reason of the severe and prolonged drouth, mentioned in the answer, to cut down the supply of water to *all* consumers under its system *one-half*.

4. That this reduction in the quantity of water supplied was made *June 7th*, 1894.

5. That the alleged rescission of one of these contracts, or the notice thereof, was not given until *October* 2, 1894, nearly *four months* after the quantity of water was reduced.

6. That on the 10th day of December following, the defendant was, by the fall rains, again enabled to furnish the full supply of water to its consumers and so notified the complainants, but they refused to accept it.

7. That by delaying to rescind, until the summer season was over, and until they could irrigate their crops, the complainants got the *full* supply of water under *one* of their contracts to the detriment of the defendant and other consumers, and now refuse to pay for the 7 1-2 inches thus obtained because they claim they have not been supplied with the water.

8. That the obligation of the defendant was to supply the

water, continuous flow, and not to store it for use during the irrigation season and the damage, if any, resulting to the complainants, was by reason of their own failure to store the water for use when needed.

9. That by the express terms of the contract sought to be rescinded, it was provided that if the defendant was prevented by *drouth* or the *failure of the average amount of rainfall in the mountains* the land of the defendants should, "*during the period of such shortage*, be entitled to *only such water as can be supplied to and for it after the full supply shall have been furnished to all* cities and towns that are or may be dependent either in whole or in part upon said system of water works for their supply of water for municipal purposes and for the use of their inhabitants."

10. And the contract further expressly provides that the defendant "*shall not be responsible for any deficiency* of water occasioned *by any of the above causes*, but the party of the first part shall use and employ all due diligence at all times in repairing and protecting its said flume and in maintaining a flow of water therein."

11. The evidence does show the greatest care on the part of the defendant in maintaining its plant and supplying the water to consumers.

12. The annual rate to be charged by the defendant for water was fixed by the board of supervisors as provided by law.

Upon the facts as stated we submit that the following principles of law are applicable to the case, and decisive, in favor of the defendant, both as such defendant and as cross complainant.

1. The case is not one for equitable relief by way of rescission or cancellation.

a. Because no equitable ground for rescission is shown.

b. Because the contract sought to be rescinded is one for the payment of money, merely, and complainants have an adequate remedy by way of defense to the action.

c. For a failure to furnish the water contracted for there was an adequate remedy by mandamus.

d. Because the failure to comply with the contract by the defendant, if there was a failure, was only temporary and partial.

e. Because the complainants did not act with reasonable promptness in giving notice of rescission.

f. Because the complainants did not restore, or offer to restore, to the defendant what they had received under the contract.

2. *No grounds for rescission are shown;*

a. Because the contract was in no way violated, but was fully complied with by the defendant.

I.

There can be no doubt of the jurisdiction of a court of equity to rescind and cancel a contract upon equitable grounds, such as fraud, mistake or the like, or where such contract is invalid, or wholly void, and such contract is, or is threatened to be, made the foundation of an unjust claim. But in order to warrant the interference of a court of chancery, some of these equitable grounds for relief must be shown. We submit, however, that this case does not fall within the rule contended for by counsel for appellant, for various reasons, first of which is:

a. That it is not shown that the contract is invalid, or void, or was obtained by improper means, or was executed by mistake.

Nothing appears from the bill showing, or tending to show,

the invalidity of the contract, or that it was obtained by fraud or other improper means. The civil code provides, sec. 3412, that a contract, where there is reasonable apprehension that if *left outstanding* it may cause serious injury to a person against whom it is *void* or *voidable* may, upon his application, *be so adjudged* and ordered to be delivered up or cancelled.

Now, here are two elements, both of which must concur in order to give a court of chancery jurisdiction to interfere.

1. The contract, if *left outstanding* will cause serious injury, and

2. The contract must be *void* or *voidable.* And, in order to justify a cancellation of the instrument the court must adjudge that these two grounds exist.

In this case neither the one, nor the other, is shown to exist, either by the allegations of the bill, or by the evidence. It is not pretended that to leave the contract outstanding would work the complainants any injury. The only ground of complaint is that they have been damaged by a partial failure to perform, for the space of four months, one of the covenants in a valid contract, for the performance of which the complainants were bound to pay money only. Therefore there is no ground for relief under the section referred to, and the section is merely a statutory declaration of what the equitable rule was before its enactment.

In *Castro v. Barry*, 79 Cal., 443, cited by counsel, it is said, quoting from *Hibernia S. S. Soc. v. Ordway*, 38 Cal., 681, and after quoting section 3412 supra:

"In an action to remove a cloud, there can be no question but that the facts which show the *apparent* validity of the instrument which is said to constitute the cloud, and also the *facts showing its invalidity* ought to be stated." Page 445.

And again, in the same case, in distinguishing between this kind of action and one to determine an adverse claim, the court says, at page 446:

"The distinction between the two kinds of actions is clear. They are different, not merely in form, * * but in purpose. In the former case the proceeding is aimed at a particular instrument or piece of evidence *which is dangerous to the plaintiff's rights,* and which may be *destroyed in whosesoever hands it may happen to be.*"

And, certainly, it cannot be destroyed in whosesoever hands it may happen to be, on the mere ground that a partial defense may be made against it in whosesoever hands it may happen to be, on the mere ground that a partial defense may be made against its enforcement, or damages recovered for a partial and temporary or any breach of the contract and without any showing of its invalidity, or of any damage that would result from its continued existence.

Ingram v. Smith, 83 Cal., 234, cited by counsel is favorable to our contention. There the ground for cancellation was that the note was fraudulent and might be transferred to an innocent holder, against whom the defense could not be made.

We challenge counsel to point out a single allegation in their original bill, even tending to show the invalidity of the contract, or that will, in any way work the complainants an injury if not cancelled. The bill has none of the elements of a bill to cancel or rescind an instrument. With the exception of the allegation that they *did* rescind the contract, and a *prayer* that it be cancelled it would not be suspected that the bill was filed for any such purpose. There is no allegation in the pleading "showing the invalidity of the contract," nor are any facts stated from which its invalidity can be inferred. On the contrary they insist upon its validity

and seek to recover damages *for its breach.* There is no allegation that the contract creates a cloud upon the complainants title to their lands or any allegation, or attempt to show, that any injury will or can result to them if the instrument is not cancelled, nor even an allegation that the defendant is making any claim under it against the complainants. In short there is not a single allegation in the bill which could give a court of chancery jurisdiction to interfere. As we said before, there is not a single element in the bill that should be contained in a bill for the rescission and cancellation of an instrument. Aside from the prayer for relief it is a common law action for damages, for a breach of contract, and nothing more. Their bill having been dismissed on the first hearing, we must look to their answer which alleges no ground for rescission and contains no prayer for such relief.

In all the cases cited by counsel, in support of the jurisdiction of a court of equity to cancel an instrument, one or the other of the grounds of exclusive equitable jurisdiction, viz: fraud, mistake, or the like, were shown. In the absence of such a showing there is no ground for equitable relief.

Pom. Eq. Jur., secs. 110, 188, 221, 870, 899, 910, 915, 1377.

Globe Mut. Life Ins. Co. v. Reals, 79 N. Y., 202.

Ryerson v. Willis, 81 N. Y., 277.

Chicago T. & M. Ry. Co. v. Titterington, 19 S. W. Rep. 472.

Here there is neither pleading nor evidence to support any such relief.

b. The contract is one for the payment of money, only, and the appellants had an adequate remedy at law.

We have shown that no ground for cancellation is alleged

in the original bill, nor in the answer. But if there had been this equitable proceeding cannot be maintained because the appellants had an entirely adequate remedy at law. This was a contract which, so far as appellants are concerned, renders them liable for the payment of the price stipulated to be paid for the water right, and the annual rental for the water when delivered. Even where fraud or mistake is alleged a court of equity will not interfere, where a defense may be made at law, unless the instrument is one, valid on its face, and may be transferred to an innocent holder in such way as to cut off the legal defense.

Pom. Eq. Jur., sec. 221, p. 224; secs. 911, 1377.
Globe Mut. Life Ins. Co. v. Reals, 79 N. Y., 202.
Fowler v. Palmer, 62 N. Y., 533.
Hamilton v. Houks, 1 Johns. Ch., 517.
Kelly v. Christal, 81 N. Y., 619.
Kimball v. West, 15 Wall., 377.
Hepburn v. Dunlap, 1. Wheat., 179, 196.
True v. Loring, 120 Mass., 507.
Travelers Ins. Co. v. Redfield, 40 Pac. Rep., 195.
Stewart v. Mumford, 80 Ill., 192.
Insurance Co. v. Bailey, 13 Wall., 616, 620.
Hipp v. Babin, 19 How., 271, 277.

As shown by the case last cited, it is expressly provided by the judiciary act "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain adequate, and complete remedy may be had at law."

See also Appeal of Travis, 8 Atl. Rep., 601, 606.

And if the invalidity of the instrument appears on its face it cannot be cancelled because it can do no injury.

Civil Code, sec. 3413.

c. For the failure to furnish the water contracted for there was a complete and speedy remedy by mandamus.

As we have said, the complainants had an adequate and speedy remedy, if any attempt should be made by the defendant to enforce the contract. On the other hand the only ground of complaint in the bill is that the defendant had refused to furnish the water contracted for, and had wrongfully diverted the water from the appellants' lands, and supplied it to others not entitled to it, as against the appellants; and, especially, that it had wrongfully supplied water to the City of San Diego. If this were the case, and, as we say, it is their only ground of complaint, they could at once have procured a writ of mandamus and have compelled defendant, thereby, to turn on the full supply of water to which they were entitled.

Price v. Riverside L. & I. Co., 56 Cal., 431.

And, if a party has a speedy and adequate remedy by any of the ertraordinary proceedings at law, as, for example, *mandamus* or *certiorari*, he must resort to such remedy.

Barber v. West Jersey Title &c. Co., 32 Atl. Rep. 222.
Jackson v. Mayor &c., 31 Atl. Rep., 233.
Burgess v. Davis, 28 N. E. Rep., 817.
Bodman v. Drainage Com'rs, 24 N. E. Rep., 630.
Van Natta-Lynds Drug Co. v. Gerson, 23 Pac. Rep., 1071.
Heywood v. City of Buffalo, 14 N. Y., 534.

No more speedy and adequate remedy could be devised in case of the wrongful diversion of, and refusal to furnish, the water. The course taken by the appellants furnishes the most ample proof that their object is, not to obtain their rights under the contract, but to find some excuse for evad-

ing the payment of the amount agreed to be paid for the water right.

d. The failure of the defendant to comply with the contract, if there was a failure, was only partial, and temporary.

Conceding that there was a breach of the contract, on the part of the defendant, which we will show, further on, there was not, it was only a partial and temporary failure and gives no ground for equitable relief. It was merely a failure to deliver a part of the water contracted for and shows no intention on the part of the defendant to abandon the contract.

Travelers Ins. Co. v. Redfield, 40 Pac. Rep. 194.

Powell v. Berry, 22 S. E. Rep., 365.

Woolen v. Walters, 14 S. E. Rep., 734.

Gomer v. McPhee, 31 Pac. Rep., 119.

Gill v. Johnstown Lumber Co., 25 Atl. Rep., 120.

Blackburn v. Reilly, 1 Atl. Rep., 27 .

Burge v. Cedar Rapids &c. R. R. Co., 32 Ia., 101.

It was a breach that could be fully compensated for in damages and by the enforcement of the contract; and, therefore, a court of chancery will not cancel the contract.

Travelers Ins. Co. v. Redfield, supra.

Kimball v. West, 15 Wall., 377.

The failure was simply to furnish a given quantity of water for the space of four months, for which a given price was to be paid, which brings the case clearly within the rule established by the authorities cited. The evidence shows that within two months after the notice of rescission was given the defendant was ready and offered to again furnish the full supply of water but the plaintiff refused to accept it.

Record, pp. 30, 31, 157, 186, 190, 191.

e. Because the appellants did not act with promptness in giving notice of rescission.

The appellants did not rescind the contract immediately on the supply of water being reduced. By no means. They held on and got the 7½ inches, or one-half the quantity of water, until their grapes could be irrigated, and then, after the water had been cut off for *four months*. They claim now that they were entitled to fifteen inches under the other contract and that they were taking that water only. But, if so, they were getting it under false pretenses, and robbing other consumers of their *pro rata* share of the water. Under this first contract they were only getting one-half of their supply and the same under their second contract. Why did they not rescind both contracts, as one was violated if the other was, and to the same extent. The reason is apparent. They owed the entire $9,000 due for the water right under the contract they are attempting to have rescinded, and are attempting, under a most flimsy excuse, to avoid the payment of an honest debt. And in order to get all they possibly could out of the defendant they took all the water they could get from both contracts, during the whole summer season, when other consumers, who were willing to share equally with their neighbors, and pay for what they got, were suffering in common with them, and did not think it best to rescind the contract until they had got all that was to be had during the summer when it was needed. They could well afford to do without the water after the summer was over. The evidence shows that they only bought water enough under both contracts to irrigate a part of their lands. And it is quite evident that their sole and only object, in their attempt to rescind this contract was to avoid paying for the water. Mr. Donald, the foreman of complainant, is asked to explain why this course was taken but is unable to do so.

Record, p. 133.

f. Because the appellants have not restored to the defendant what they had received under the contract.

We need not cite authorities to establish the rule that a party who seeks equity must do equity, or that a party who seeks to rescind a contract must place the other party in *statu quo,* by restoring to him all the benefits that have been received under the contract. This has not been done, nor offered to be done in this case. What was it the complainants purchased? It was a water right to fifteen inches of water. For this right to the use of the water they agreed to pay $9,000. So far as the conveyance of this water right is concerned the contract was fully executed and the right was attached to the lands of the appellants, not only by the contract, but by the actual delivery of the water on the land, which, under the code, gave them the right to the continued use of the water.

Civil Code Cal., sec. 552.

Under this water right, so vested in them, they received the water for irrigation from March 12th, 1890, until June 9th, 1894. They do not tender any reconveyance of this water right which is vested in them both by contract and by operation of law, nor do they offer to pay anything for the time they have enjoyed the benefits of the water right by receiving the water under it. They say in their bill that they will reconvey the water right but they make no tender of a conveyance. And as their bill has been dismissed there is no such offer or foundation for rescission under their answer. They contracted to pay $9,000 for this water right, in addition to the rental agreed to be paid for the water itself, as used. Therefore the water right must be regarded as valuable. Not only so, but, for the water they actually received, they have not paid in full. According to their own

notice of rescission they have only paid for water up to *May 1st, 1894*. They received and used their full supply of the water up to June 9th, 1894, and a *one-half* supply up to December 8th, 1894, *two months* after they gave notice of rescission. For all this water received, and used, after June 9th, they have paid nothing, and offer to pay nothing. They very generously offer to let us keep $2,250.00 which they have paid us for water actually received, and used before that time, but as they got full value from that water we submit they were simply offering to give us our own money for the water they admit they received and never paid for. But as an offset to this apparent generosity, they demand that we repay them the interest paid by them on the amount due us when they were actually using the water.

Record, p. 40.

They claim, of course, that after June 9th, 1894, they were receiving *all* the water that was being furnished, under the other contract for fifteen inches, but the defendant had, on the 9th day of June, notified them that it could only furnish one-half the full supply, after that date, under all contracts, and to all consumers. So the appellee was actually furnishing 7½ inches under the contract they sought to rescind and the same amount under the other. The complainants had no right to elect to take *all* the water under one contract and *none* under the other, and to rescind the one contract on the theory that it was not being complied with and to hold onto the other on the theory that it was being fully performed.

See notice of defendant of reduction in amount of water to be furnished . Record, p. 303.

And complainants' notice of rescission, p. 304.

Also notice that full supply would again be furnished. p. 307.

And the complainants' refusal to receive it under one of the contracts.

And the defendant's refusal to recognize the rescission, and notice, that it will collect the rentals for water, p. 308.

But conceding that this is a case in which a court of chancery might properly entertain jurisdiction if sufficient grounds were shown therefore, we maintain that no ground whatever has been alleged or proved for the rescission of the contract. As we have said, the sole and only ground of complaint is that there was a breach of a contract to furnish a certain amount of water. While maintaining, that if true, this is not a ground for rescisson, but for an action at law for damages, we propose to show that there was, in fact, no breach of the contract. While the contract obligated the defendant to furnish fifteen inches of water there were certain excepted cases in which it was not to be so bound, and in which, if it failed to furnish the full supply, it was not to be held responsible. The provisions upon which we rely, as excusing the defendant for the failure to supply the full quantity of water, and exempting it from liability if it does so fail, are set out in full above.

The evidence brings the case clearly within these exceptions. Therefore, if the answer contained the same allegations that were set out in the original bill there would be no ground whatever for a rescission of the contract. But as we have shown, the answer contains no allegations upon which a claim for such relief could be founded and none is asked for. Again, this question was definitely settled by the decision of the case on appeal. The original bill was not before

this court, but the cross bill and answer were. And the appellants contended, in this court, as they do now, that they were entitled to a rescission of the contract. The court below had held that they were not entitled to a rescission of the contract because it was void and they needed no such relief. On appeal they contended that the case was one for rescission, conceding that the court was wrong in its conclusion that the contract was absolutely void, and, therefore, the cross complainant was not entitled to a reversal of the decree dismissing its cross bill because they were entitled, under the evidence, to a cancellation of it, and the right result had been reached by dismissing the cross bill to enforce the contract.

It was to this contention that this court was addressing itself in discussing the question whether this was a case for a rescission or not. Clearly the decision covers the point and decides it adversely to the appellants. And as the pleadings have not been changed and no additional evidence has been taken the decision is the law of the case. However, whether it is or not, we think this court will have no doubt as to the correctness of the decision. We need not enter upon a review of the authorities cited by counsel on this point. Their whole argument is based upon their unwarranted claim that there was a total want of performance on the part of the company, when, as the undisputed evidence shows, they had the full use and benefit of the water contracted for, for four years; that they were only cut down to a one-half supply made necessary by the extraordinary drought, and that they were, after six months, again offered a full supply and refused it. To say that under such circumstances they can repudiate the entire contract and have it rescinded is to our minds nothing short of absurd. Counsel do cite some author to the effect that a contract may be rescinded

for a partial failure to perform. Doubtless cases may arise where the partial want of performance is such that it would be inequitable to enforce the contract as against the other party to it. But this cannot be so where the breach complained of can be compensated in damages and the balance of the contract remain intact as to both parties to it. And in any case, where there has been a partial performance, and the complaining party has received something under the contract he must, as a condition upon which, alone, he may rescind, restore what he has received and place the other party to the contract in *statu quo*. We have shown above that in this case nothing of the kind has been done. Amongst other cases cite to the proposition that a partial failure to perform will warrant a rescission is Richter v. Union L. & S. Co., 129 Cal., 367, lately decided by the Supreme Court of California. But in that case the failure was not partial but total. The contract was executory, entirely; no water at all was ever furnished under it, and it was expressly held by the court that the water right agreed to be conveyed was worthless and therefore the promise of the respondent without consideration. What was said about a rescission on account of a partial failure to perform was the purest *dictum*. And it will be seen that the court in using this language confined it to executory contracts. The decision can have no weight in a case like this where a contract is not executory and has been fully performed for a number of years and where the water right has actually vested in the complainants and become appurtenant to their lands. It will be seen, upon an examination of the other cases, that the right to rescind, for a partial failure to perform, is placed upon some equitable consideration of the court, or where that portion of the contract not performed is a *condition* express or implied to performance by the other

party, and most of them where the consideration is personal services involving peculiar knowledge and skill.

Watson v. Ford, 93 Fed. Rep. 359.

The cases of Farmers' L. & T. Co. v. City, 133 U. S., 156, and Capital City W. Co. v. State, 105 Ala., 406, 29 L. R. A. 743, are so essentially different from this case as to deprive them of all weight upon the question under discussion. There, there was an unqualified obligation on the part of the person or company to supply the water, while here there was an exception, as we have shown, to the effect that the company should not be held liable for failure to supply the full quantity of water, if prevented by extreme drought, and it was, as we shall show further along, upon this very ground that the learned judge of the court below held that the answer of the appellants and the evidence submitted under it showed no defense to our cause of action. It is unnecessary to undertake to review any of the authorities cited by counsel on the other side, for this very reason. If there had been an unqualified agreement on the part of the company to furnish the water, and it had failed, and damage had resulted to the appellants, an altogether different case would have been presented. It would not, as we have shown, have entitled them to the rescission of the contract, but it would doubtless have entitled them to damages for the injury resulting. But this case does not turn upon that question. It was decided in the court below, and must be decided here, upon the ground either that the contract did excuse the appellee from furnishing a full supply of water on account of the drought, or that it did not. The court below held that the contract did excuse the appellee, and that is the only real question here for determination.

We submit that there is nothing in any of the cases cited

by counsel that would justify a court of equity in rescinding a contract under the conditions shown here.

II.

THE DOCTRINE FIRST IN TIME FIRST IN RIGHT CAN HAVE NO APPLICATION IN THIS CASE.

Counsel have undertaken to invoke the doctrine "first in time, first in right" in aid of their defense. This is a question of extreme gravity and transcendant importance, not to the parties now before the court, alone, but to all water companies engaged in distributing water to the public and above all to the consumers of water taken from such companies and dependent thereon for the irrigation of their orchards and their crops. Counsel on the other side have chosen to treat the subject lightly,, and characterize our claim that there is no priority of right as between consumers taking water from a company like the defendant as absurd. This may be so but if it is we must be allowed to consider it a great misfortune. If this doctrine does prevail, as a part of the law of this state, and water takers had so understood it and enforced their rights, more than half the orchards in Southern California dependent for their supply of water upon companies storing water for rental and distribution would have gone to absolute destruction within the last three years. But, so far as we know, the appellants in this action are the only consumers that have asserted any such right. On the contrary, in every instance that has come under our observation the consumers themselves, as well as the companies, have seen the absolute necessity of an equitable and pro rata distribution of what water could be had; and they and their attorneys have had the good sense to co-operate in an endeavor, in this way, to save the orchards of *all* owners.

This court will take judicial knowledge of the history of the state and the conditions that have prevailed during the past three years. The year 1894 was an excessively dry year the like of which had not been seen in Southern California for twenty years or more. The result was a general failure of water companies to furnish a full supply of water. But the worst had not come. For the three last years an unprecedented drought has prevailed. Companies wholly dependent upon stored water have had practically no water at all for distribution except where they have, by extraordinary efforts, and much expense, created a new supply by underground pumping. This has been done by the defendant, by which consumers under its system have been saved and have produced good crops. But for much of the time the company has been able to supply only *one-fourth* of the amount of water its consumers were entitled to receive under their contracts. The history of conditions prevailing in the section watered by the San Diego Land and Town Company, including over four thousand acres of orchards has been practically the same. As to these communities we speak from actual knowledge. We understand conditions have been much the same in other localities. Now what would have been the result if the law is as counsel contend for it and the law had been enforced? It would have been most disastrous. It would have left three-fourths of these orchards without any water at all and they would have perished.

This court may feel itself impelled to declare and enforce such a doctrine otherwise, surely, it will not do so.

But where is the law declared, either by the constitution or any statute of the state, or by any decision of any court, that leads to any such conclusion? The court below has come nearer foreclosing this question by its own decisions than

has any other court. These decisions are appealed to by counsel on the other side as conclusive of the question. They are:

Lanning v. Osborne, 76 Fed. Rep., 319;

San Diego Land and Town Co. v. Sharp, 97 Fed. Rep., 394;

Mandell v. San Diego Land and Town Co., 89 Fed. Rep., 295.

It so happens that we were connected, as attorneys for the San Diego Land and Town Company, with all of these cases and we are in position to say that in none of them was the question of priority of right between consumers taking water from the company in any way involved, nor did the question of the rights of such consumers, in case of a shortage of water arise.

We desire to point out, briefly, what the questions were, and to what extent they should be taken as authority when the question of priority of right is presented.

In Lanning v. Osborne the sole and only question involved was whether the company had or had not the right to increase its annual rates for water. It was maintained by the consumers that it had no such power for two reasons, viz., because it had already fixed and established a rate that must stand until changed by the board of supervisors and because it had contracted with consumers for water rights in such way as to estop it from changing the rate. This is clearly shown by the statement of the question by the court in the opinion. After setting out, quite fully, the allegations of the pleadings the court said:

"Copious extracts have thus been taken from the answer to show the grounds upon which it is strenuously contended the water in question must be continued to be furnished to

the defendants for irrigation at the annual rate of $3.50 per acre.

Page 328.

And the statement by the court of the doctrine first in time first in right was a mere passing remark made in commenting on a Colorado case involving the right of a consumer of water to prevent the company from selling more han it could supply, to his injury; a right that no one can reasonably question. This case cannot be treated as a decision of this question. And the court will take notice of the fact that no such question was argued or presented.

The same thing is true of the Sharp case. There a special contract had been made between the company and Sharp by which he was to have a certain quantity of water from the system of the company for a limited time, five years, in which contract Sharp, in terms, waived his right to claim the water perpetually under Section 552 of the Civil Code. The company claimed that it had made the contract limitiing the time it should serve Sharp's place because it was at a high elevation and difficult to supply and as the number of consumers of the company increased it would be impossible to supply his land without depriving a much greater area of land, on lower levels, of a water supply.

The court held the special contract to be void and that, as the water had been once supplied to his land Sharp was entitled to its continued use, and that the fact that his land could only be served with difficulty and to supply it would deprive a greater area of more favorably situated lands with water could not affect his legal right to its continued use. There was no question whatever of priority of right as between him and other consumers, or of the right of later takers of water to pro rate with him in case of a shortage. The

language of the court, at the close of the opinion, might indicate that such a question was involved but it was not. The sole question was whether he had any legal claim to the water, as against the company, not as to the extent or priority of his right as against some other consumer if he was entitled to water. The case of San Diego Land and Town Company v. Sharp, cited by counsel, was the same case on appeal to this court, and of course involved the same question. This court did not pass upon the question of the validity of the special contract but held that as the contract was for a limited time and that time had expired it was no longer of any force, and as the water had been supplied to Sharp's land he was entitled to its continued use under section 552. The only ground for claiming this decision as supporting this contention is that it quotes with approval the closing language of the the opinion of the Circuit Court, to the effect that to allow the water to be taken from Sharp's land and supplied to other lands more favorably situated would be in violation of the well established rule that in cases like this the first in time is first in right.

We hope to convince the court that in a case like the one at bar there is no such rule.

The case of Pallet v. Murphy, 63 Pacific Rep., 366, is also cited. We do not understand why. The writer of this brief was one of the attorneys in that case and this is the first time it was ever intimated that there was any such question there as is now presented. There certain tenants of land claimed the right to water from the defendants' ditch by virtue of a deed of their lessors of a right of way for the ditch, in which it was provided that they should have water from the ditch on as favorable terms and conditions as it was supplied to others. The defendant had sold permanent water rights to

a part only of his water supply. The surplus was sold, to whoever applied for it, at a fixed price per hour. The only question was as to which class of consumers the plaintiffs belonged. At the time application was made for the water the surplus had all been taken and the defendant claimed that the plaintiffs stood on the footing of other takers of surplus water and had no permanent water right. In his first decision of the case Judge Shaw of the Superior Court held that the grantors of the right of way for the ditch, and lessors of the plaintiffs acquired a permanent water right. On motion for a new trial he modified and changed his holding so as to find that the plaintiffs were entitled to water, as against mere transient takers by the hour, and that such contractors for a temporary use of the water must take notice of this right given by the deed. And this was all that was decided both in the court below and on appeal to the Supreme Court. The question of priority of right, in the sense in which it is sought to be raised here, was in no way involved in the case.

So, we respectfully submit, that this is an open question to be decided on its merits and if it is presented here should not be determined by any previous decision of this or any other court.

This being so let us inquire what is the law on this important question. That a purchaser of a water right has a tangible right to the water no one else should deny. That, in some cases, his priority in time of purchase or other acquisition of this right may be asserted and enforced we entertain no doubt. But under what circumstances, and against whom, is the material question as it affects the case at bar. And this involves the broader question of the nature and extent of the rights of a water company like the defendant in the water it

appropriates to public use. The law is, undoubtedly, that such a company is the mere agent for the delivery of the water to lands under its system, at least to the extent that the owners of such lands may compel it to supply their lands, to the extent of its ability to do so, with the water it has appropriated, but no farther.

Lanning v. Osborne, 76 Fed. Rep. 319;
Price v. Irrigating Co., 56 Cal. 431;
People v. Stephens, 62 Cal. 209.

But the question here is does each of the land owners to whom a water right is sold, or water furnished under section 552 of the Civil Code, become the owner of a water right for the amount of water purchased or applied to his land in the order of time of such acquisition of the right, to the exclusion of all subsequent takers, or do they become the owners in common of all the water and entitled to share it equally, bearing, in proportion, the loss, if any by extraordinary conditions resulting in a shortage of the water supply of the company. In dealing with this question we should not be trammeled, in any way, by reason of the well settled rule that, as between private appropriators of the waters of a stream, the doctrine "first in time first in right" does prevail. The cases are in no proper sense parallel cases. There there are as many separate appropriations and owners as there are users from the stream. But where the appropriation is made by a water company, for public use, there is but *one* appropriation for all who may thereafter be supplied with water under that appropriation. And, this being so, by what right may one of the many for whose benefit the appropriation was made say my rights are superior to my neighbors, supplied later, because I was supplied *first*. There can be no reason whatever. To illustrate: A company appropriates

five hundred inches of water for the public use. There are twenty-five hundred acres of land under its system to be supplied with water. This would give them one inch to five acres which ordinarily would be ample for their needs. The company commences to construct its system and supplies the lands, as it reaches them. Does counsel mean to say that under such circumstances the man that receives water one day has a superior right to the one that is supplied the next day and so on down the line, and that if, while of an ordinary or average season all could be supplied the full amount, a dry year should come along when the company could only furnish two hundred and fifty inches of water, the first twelve hundred and fifty acres must be supplied in full and the balance take nothing? And in such cases, laying aside all questions of contract liability, for the moment, could the company be held liable for damages for the total failure to supply the half of the land last furnished with water in the beginning? That is the doctrine contended for by counsel. Is it just? Is it good law? We maintain, with confidence, that no such doctrine can or should prevail. The company appropriates five hundred inches of water. It is one single appropriation. Every right to the use of any part of that quantity of water derived from the company, either by contract or the mere application of the water to the land, relates back to and is a part of that single appropriation of the whole. The taker of water from the company takes his proportionate share of that one water right, in common with other takers from the company, and without priority. This seems to us to be so manifest as to need no support by argument. And any other rule would be most disastrous to both the company and its consumers. As we have shown above its enforcement, as contended for, the last three years

would have destroyed more than half the orchards in Southern California. And, while the courts cannot be swerved from a right construction and enforcement of laws by the fear, or certainty, of disastrous consequences such consequences are proper to be borne in mind where the proper construction of law is doubtful.

As we have said we are without authority on the subject. But the distinction we are contending for, between the case of one who diverts water from a running stream and one taking water from a company like this, that has made such diversion, is clearly recognized in some of the cases in Colorado:

Farmers High Line Canal & Reservoir Co., v. Southworth, 21 Pac. Rep. 1028;

Wyatt v. Larimer & Weld, Jr., Co., 29 Pac. Rep. 906.

In the first case cited Chief Justice Helm said:

"Under the constitution, statutes, and decisions, as I read them, the consumer takes with full knowledge that the carrier's entire diversion will ripen into valid appropriations, provided the water be applied within a reasonable time to beneficial uses. He also takes with knowledge that the different lawful co-consumers will have the same priority, a priority resting for its commencement upon the carrier's diversion, or dating from a subsequent enlargement of the quantity of water to which the carrier was originally entitled. He must therefore be presumed to know that in times of scarcity his use may be subjected to two interruptions, viz: *First*, that canals and ditches holding priorities antedating the diversion of his carrier may demand all the water in the natural stream, so that there will be none for him or any of his co-consumers; and, *Second, that if there is water, but not the full quantity appropriated he will be obliged to prorate with such co-consumers.*

* * * *

I would conclude this opinion here were it not for the fact that others, including one of my colleagues on the bench, are firmly convinced that the foregoing construction of the

constitution is unsound. *They contend that the constitution guarantees to each consumer a priority dating from the commencement of his individual use.* The carrier's original diversion, say they, has nothing to do with the consumer's priority; it is as if the consumer, at the date of his use, made a distinct and independent diversion from the natural stream, merely employing for the purpose the carrier's canal; and upon this constructive diversion rests the superstructure of their theory regarding the consumer's appropriation and priority. To what has already been said may be added the following considerations which preclude the adoption of this view:

I. It is wholly impracticable, and hence it would operate to defeat the beneficent purpose of the constitutional provision upon which reliance is placed. The protection awarded in connection with a consumer's constitutional priority, extends to controversies between him and all his co-consumers, though their number be legion; but the assertion of his rights cannot be limited to such controversies. He is necessarily entitled to the quantity of water covered by his appropriation as against all others obtaining water at a later period, directly or indirectly, from the same natural stream. The priorities of all appropriators from a given natural stream whether employing carriers or constructing private ditches, must be adjudicated, and the prior right of each must be sustained. The total number of ditches taking water from a natural stream may be 100; the total number of persons receiving water through these ditches may aggregate 5,000. There are already in the state carriers who each supply several hundred consumers. No serious difficulty would be encountered in adjudicating priorities as between the 100 ditches; but to the satisfactory adjustment and maintenance of separate priorities belonging to the 5,000 individual consumers all the available judicial machinery, if it did nothing else, would prove inadequate. Not only must there be a priority for each consumer corresponding, according to the view we are now considering, with the date of his first application to use, but there must also be an additional priority for each subsequent enlargement of the quantity of water taken by him. Besides, certain consumers will abandon the use of water from the carrier, and other consumers will secure the right to the use thus abandoned. In each case of this kind the old priority

must be dropped, and the new priority recognized. This new priority then becomes a factor in readjusting the 5,000 priorities. Nor is the quantity of water appropriated at all sufficient. The appropriation, whether it be enough for 5 or 500 acres, is to receive precisely the same recognition. Moreover, all these priorities are to be accurately determined, as well as impartially protected. They depend upon the dates of the respective applications to use, and these dates must be ascertained with reference, not merely to years nor to months, not even to weeks, but also with reference to days. There is no exaggeration in the foregoing; for, if the constitution gives each consumer a priority from the date of his individual use, the legislature can adopt no rule that shall prevent the assertion of this constitutional right. That body, under the supposition mentioned, has no power to say that a consumer from the same or another canal, who began using a month, a week, or even a day, later than he, shall be has equal in this regard.

* * * *

Any consumer has under this view the constitutional right to call for a re-adjustment of priorities based upon the date of his individual use. In such case not only must the re-adjustment assign to him a priority with reference to his co-consumers, but the re-arrangement of priorities must also include the consumers from other canals, as well as individual appropriators, from the same natural stream; for, as already suggested, the alleged constitutional right of the consumer, if it in fact exists, cannot be confined to controversies with those taking from the same artificial stream. It relates to the natural stream, and he must be permitted to contest priorities with all parties taking directly or indirectly therefrom. To avoid, at least in part, the foregoing disastrous consequences, an ingenious theory is advanced. It is gravely argued that we have in this state a double system, more properly speaking, two systems, of priorities. The police power of the state is appealed to. It is said that the legislature has, as a police regulation, directed the ascertainment of priorities as between the canals and ditches themselves; and it is also asserted that the supposed constitutional priority of the individual consumers is at the same time recognized and protected; that is to say, a system of priorities based upon the dates of diversion by the canals and ditches co-exists with a system of priorities resting upon the dates

of use by the individual consumers. Through the former system, it is maintained, confusion and conflict in the diversion by canals and ditches are avoided, and an orderly apportionment of water is secured, while by the latter system the constitutional rights of individual consumers are recognized and enforced. This theory reads well, but the feasibility of its practical application must be doubted. Unfortunately both systems must be applied to the same identical water at the same identical time; that is, a canal prior in diversion is under one system to receive its 1,000 incres of water, while the consumer prior in use from a canal later in diversion is, under the other system, secured precedence of 500 of the same 1,000 inches of water. But how can the prior canal and the ealier consumer from the later canal, both take at the same time the same identical water? This crude illustration shows the utter impracticability of the theory. The two systems are in hopeless conflect. The supposed statutory priority of the consumer supersedes the supposed statutory priority of the canal, and whenever the arrangement of the consumers' constitutional priorities conflicts with the arrangement of the carriers' statutory priorities, the latter must inevitably give way. It seems to me that the statutes themselves tend largely to negative the double system priority theory. In the *first* place, as we have seen, they provide for the adjustment of ditch and canal priorities with reference to their respective diversions; *secondly*, they do not provide for settling the consumers' separate priorities dating from their respective uses, nor do they make any reference thereto; and *thirdly*, a right on the part of consumers to be heard upon the adjudication of the canal priorities is carefully asserted. If the consumer's reliance is upon a constitutional priority dating from his individual use, it can matter little to him what priority be assigned to the carrier's diversion. His priority of right and consequent interest are neither benefitted nor injured by the priority of his carrier. Why should the legislature be so neglectful of his real welfare, and yet so carefully extend to him a privilege and a power so useless to his personal interest or advancement? Do not these things tend to show that the legislature recognized the consumer's appropriation as resting upon the carrier's diversion for its priority, and that for this reason that body not only intentionally abstained from reference to a separate priority, but also inserted the very equitable command that before such rights

were determined the consumer should have his day in coudt? Objections to the view under consideration might be multiplied, but the foregoing are amply sufficient to demonstrate that the framers of the constitution anticipated no such construction of the language employed.

* * * *

There is no force in the argument that the construction contended for is necessary in order to prevent carriers from contracting to carry more water than they have a right to transport; nor is the suggestion more pertinent that without such construction the carrier will collect the annual rates for carriage from consumers, put the money in its coffers, and then say that it cannot deliver the water. In the *first* place, a contract to carry more water than has been lawfully diverted, would be unlawful; and to prevent injuries resulting therefrom, or to recover damages in case the injuries are suffered, ample legal remedies exist; and, *secondly,* whether in times of scarcity the water available be distributed equitably among all its consumers, or whether it be delivered to a small number thereof, is a matter of no interest to the carrier. In the absence of statutory regulation it will continue collecting its rate for transportation at the beginning of the season, and then, if there be a scarcity, will refer the complaining consumer who receives no water, or a diminished quantity, as the case may be, to the decision of this court for authority in support of its action."

This leads us to inquire what right the consumer of water has and how he may protect such right? That he has no priority or right over any other consumer *lawfully* contracting for, or receiving water, from the company is manifest. His right, in common with every other consumer, is to prevent the company from contracting to deliver, or delivering, water in excess of the capacity or duty of its system, of an ordinary or average year, and under normal conditions.

Lanning v. Osborne, 76 Fed. Rep. 319;

Farmers High Land Canal and Res. Co. 21, Pac. Rep. 1028;

Wyatt v. Larimer & Weld, Jr., Co. v. Southworth, 29, Pac. Rep. 906;

Wyatt v. Larimer & Weld, Jr., Co. v. Southworth, 33, Pac. Rep. 144.

And this must rest upon the ground that sales of water rights for water, or the delivery of water, in excess of the capacity of the company to supply the water, under ordinary conditions, in invalid and not because of any priority of right between valid holders of water rights from the company.

The doctrine is correctly and accurately stated in Lanning v. Osborne except that it may be inferred from the language used that the consumer's right was founded upon his priority over all other takers, after him, and not alone those persons to whom unlawful sales had been made. It is said page 334:

"Of course, no company can be compelled to furnish water beyond its capacity. Indeed, consumers themselves are vitally interested in seeing that the capacity of the distributor is not overtaxed; so, much so that in Colorado it is held, and properly held, that a consumer that settles upon and improves land by means of water appropriated and distributed under and by virtue of the constitution and laws of that state, giving to the first in time the first in right, can maintain a suit against the distributor of such water to prevent the spreading of it beyond the capacity of the system, so as to endanger the supply of those whose rights have already vested, and upon the faith of which they have invested their money and made their improvements. Wyatt v. Irrigation Co. (Colo. Sup.) 33 Pac. 144. In California the same right is secured to the consumer by statute, as well as by judicial decision. It has already been seen from the reference made to the case of Price v. Irrigating Co., 56 Cal. 431, and Merrill v. Irrigating Co. (Cal.) 44 Pac. 720, that the right of the consumer to demand of the corporation a supply of water pre-supposes a sufficient supply for the purpose under the control of the company; and by the provisions of section 552 of the Civil Code of California a consumer whose rights have once vested is protected from the injury of having his supply of water cut off, for it in terms declares him entitled to the continued use of the water upon the

payment of the rates established as required by law. Necessarily growing out of this right to the continued use of the water which he has acquired as a perpetual easement to his land, is the right of such consumer *to prevent, by injunction, if need be, the distributor from disposing of or attempting to furnish others beyond the capacity of the system, thereby imperiling the rights of those already vested.* So long, however, as a sufficient supply exists, every person within the flow of the system has the legal right to the use of a reasonable amount of water in a reasonable manner upon paying the rate fixed for supplying it."

Then, the company has no right to sell water in excess of its ability of an ordinary year to supply it, and one purchasing, or otherwise acquiring a water right from the company must take notice of the fact. And, so far and no farther, have the first takers of water, up to its capacity to supply it, a valid right and prior right to the water.

But right here arises the question as to the proper measure of the capacity or duty of the company's system. Is it the water it can store and deliver in an extraordinarily wet season or what it can supply of an extremely dry year or succession of years? We maintain that it is neither the one nor the other. To allow the company to sell, or in any other way obligate itself to deliver, all the water it could supply following an extraordinarily rainy season, would be unjust to the consumers, because they must, if compelled to pro rate, never receive their full supply except in or following such a season. To limit the right of the company to sales of water rights equal only to what it could supply in or followng an extremely dry season or succession of dry years, would be equally unjust to the company and to the community. To hold it liable in damages for a failure to render a full supply of water during such a year would ruin any company doing business in Southern California and render its water system practically

worthless to the community it is organized to serve. This must be so, because, under section 552, if it once puts water on the land, for irrigation, it is legally bound to furnish the water, forever after, or suffer the consequences. Therefore, if counsels contention is correct the company would not dare to furnish more water during any year than it could supply during the dryest year. And if counsel are right in their contention that a company is bound absolutely and under all conditions by such a contract as the one in controversy to furnish the consumer taking water under it with a full supply of water every such company would have been completely ruined during the past three years.

But we do not apprehend that any court will ever hold to any such doctrine. Some reasonable measure of the capacity of a company, beyond which it cannot legally contract for water—some reasonable measure or limitation of its obligation and ability in case of a failure to furnish the full supply of water in case of a drought—must be established. We submit that this can be done only by taking the amount of water that can be depended upon of an ordinary year, or a succession of ordinary years, and confining the company, in its sales of water, to such quantity as can be supplied by it under such ordinary conditions. As a result the consumers under the system would be bound to pro rate in case of a drought and the company would not be liable for the shortage under such circumstance, in the absence of negligence or want of diligence on its part. In no other way can the waters of the state be properly conserved and brought to beneficial uses.

III.

CONCEDING THE RULE FIRST IN TIME FIRST IN RIGHT TO PREVAIL BETWEEN TAKERS OF WATER FROM A COMPANY LIKE THIS THE DEFENDANTS HAVE SHOWN NO SUCH RIGHT.

We have undertaken to show that no priority of right can exist, as between holders of legal water rights acquired from the same water company. But, if we are wrong in this, we maintain that the complainants in this case are in no better condition, on that account. If there is such priority the burden is upon them to show their priority over the other consumers. This has not been done, as we have shown above, either by their answer or by the proof. It is clearly shown that water right contracts had been made with a great number of land owners aggregating 537 1-20 miners inches.

Record pp. 271-277.

And that the total number of inches in use was 326 71-100.

Record p. 277.

If it could be presumed that the water rights were acquired in the order in which they are set out in the list of sales given by the secretary the company would have been obligated to furnish 300 inches of water before the complainants would have been entitled to any water. During the summer of 1894 it could not supply more than half that amount if no water had been furnished to the city of San Diego, in the early part of the season.

Trans. p. 270.

And, at the instance of the appellants, it was stipulated that there were other water right contracts executed by the company prior in time to the one in controversy, in one of which, alone, the contract was for 100 inches.

Record pp. 244, 245.

So that there is no allegation, and no proof, whatever, that the complainants, if their alleged doctrine of priority obtains, were entitled to any water from the company. Indeed, if their claim that the company sold water beyond its capacity is maintained they may have been of the later purchasers whose water rights were invalid as against other purchasers of an earlier date. But they have not alleged the invalidity of the contract for that season.

We submit that under their own claim of priority of right they have no defense that would entitle them either to a rescission of the contract or to damages.

IV.

THERE IS NO SHOWING THAT THE DEFENDANT COMPANY HAS IN ANY WAY VIOLATED THE CONTRACT.

It is conclusively shown by the allegations of the appellants answer to the cross complaint, and the evidence, that the company had not oversold its water supply or was delivering or attempting to deliver more water than its system would supply under ordinary and normal conditions. Our statement of the evidence above shows that the capacity of the reservoir and flume of the company was not less than *seven hundred inches.* The proof is, and it is undisputed that the company only sold *five hundred and thirty-seven and one-twentieth inches.*

And that only *three hundred and twenty-six and seventy-hundredths inches* has actually been put to use. If we take their expert testimony as to the capacity of the system it shows it to have been over *five hundred inches.*

But, whatever the sales may have been, there could have been no injury to the complainants unless that water was

actually being supplied to some one else when it should have been furnished to them. And their own answer expressly alleges the capacity of the defendants' system to be *three hundred and seventy-five inches* for 365 days of an *"ordinarily wet year."*

Record p. 68.

Then the capacity of the company's system, of an ordinary year, was admitted by the answer to be 375 inches. The water being delivered by it was only 326 inches, omitting fractions, leaving a margin of 49 inches for the full 365 days of the year.

We cannot conceive of any ground upon which the complainants can defend against their contract under such circumstances.

We have reviewed the evidence, above. It shows that, of an ordinary year, the company could have furnished a full supply of water to all its consumers, and that it had always done so up to that time. Can it be possible that for a failure to do so, on account of an extraordinary drought, the company can be held in damages to every consumer whose water supply fell short, when the company has used every effort, and every precaution, to so distribute and conserve the water as to protect all consumers as fully as possible? We cannot believe any court will so hold. It can make no difference whether the provisions relied on by us relieves it from liability or not. It cannot, as matter of law independently of contract, be held in damages where it has been guilty of no negligence but has done its whole duty to all of its consumers and thus minimized the loss resulting to them for the shortage of water.

And we think we have shown by the review of the evidence above that no violation of the appellants' rights was committed by supplying water to the city of San Diego, through he San

Diego Water Company. It had been doing so for years. It was organized partly for that purpose. The city was dependent upon it for its water supply and suffered severely as the evidence shows when it withdrew the supply.

And, as we have shown, there is no basis, either in the pleadings or the evidence for the claim that the appellants' right to the water was in any way superior, either to the city of San Diego or the San Diego Water Company, or that to supply water to them, or either of them, was a violation of their rights.

The whole trouble and the loss, if any, to the appellants was the result of their own neglect to save and store for use the water needed by them during the summer season. They were entitled to 15 inches of water, continuous flow for three hundred and sixty-five days. The company was not bound, under its contract, to store the water and deliver it all during a few days when they were actually irrigating in summer. The evidence shows that they only irrigated their grapes once or twice a year, and all the balance of the year the water to which they were entitled was allowed to run to waste or past on to some one else.

Record p. 174.

They had the legal right to take their fifteen inches, continuously, or as much of the time as they pleased, and store it for their use when they needed it. They did not do so. It was impossible for the company to do it if it had tried. A great part of the water flowing in the streams during the winter and spring must, necessarily, be lost if not taken out and stored. Most of these streams were below the companies' storage reservoir, but by means of a diverting dam the water was conducted into its flume and carried down, as much as the flume would carry, to the consumers, thus saving the water

in its storage reservoir as long as possible. Other consumers, as the evidence shows, did provide means of storage of this surplus water, but the appellants did not. They suffered loss. It was their own fault in failing to save what was theirs under the contract. This being so they can have no claim against the defendant.

V.

DAMAGES.

If we are right that there was no breach of the contract on the part of the defendant there can of course be no recovery of damages. But if there was a breach of the contract, the amount of damages is greatly exaggerated, we have no doubt. The secret of the whole effort to get rid of this contract, and at the same time recover damages is that the raisin industry is not a paying one. The testimony of Mr. Donald, the foreman of the complainant, fixes the damages at about $6,050.

Record p. 133.

But it is a most singular fact that the complainants, if this story be true, should be trying to get rid of this contract, and deprive themselves altogether of the water. The absurdity of the whole thing appears in the cross examination of the witness. He sticks to his story, manfully, throughout, notwithstanding he is compelled to admit that every year they do without the water they will be damaged, for the want of it, from $5,000 to $6,000. He says:

"Q. Has it been damaged in an equal amount by your the year 1894 by the failure to get your full 30 inches of water?

"A. About $6,500 damage.

"Q. Has it been damaged in an equal amount by your having the same quantity of water only this year?

"Mr. Gibson: Objected to as incompetent, irrelevant and immaterial.

"A. Pretty nearly so.

"Q. You have lost about as much then this year by not having the water as you lost last year?

"A. Very nearly so.

"Q. Then you estimate, Mr. Donald, that by the failure to receive this 15 inches of water the owners of the Boston ranch will be damaged each year from five to six thousand dollars?

"A. So long as they remain out of the water; yes, sir.

"Q. Is there any other source from which there is any probability of getting water in the near future?

"A. I am not competent to answer that question, sir.

"Q. You do not know of any do you?

"A. I do not know of any."

Record p. 134.

In other words, they are so anxious to get rid of this contract that they would rather suffer loss that would in a year and a half, pay the whole amount due upon the water contract than not. The truth is that they have simply made this temporary shortage of water an excuse for breaking their promise to pay for the water right, and at the same time recover damages if they can. No one can read the evidence in the case, we sincerely believe, and not be convinced of this fact.

This witness, who is their chief reliance, on the subject of damages, shows, on his cross examination, that he really knows very little about the actual damage resulting from the want of water. He admitted that he did not know what the fruit sold for that year, or what profit they could have made if they had grown and marketed a full crop.

Record, p. 122.

And he admits that the crop of rasins was generally short that year.

Record p. 129.

There is another significant fact disclosed by his testimony.

He says they were experimenting to see how well they could get along without water.

Record p. 132.

Again, if damage occurred to the appellants, it was, in a large part, if not wholly, by reason of their own fault and negligence. Their contract with the appellee was for a continuous flow. They rad no right to ask or expect water for their use during the short time they needed it for irrigating their grapes. This was a very material matter to the appellee, because, during fully one-half of the year, when the water was furnished continuously, it could furnish it from the running streams, without drawing upon the reservoirs. And in a section of country where the full benefit of the water can only be had by storing it, this is a very important consideration. And in San Diego county this can only be done by providing storage reservoirs, which are exceedingly expensive, because there are no natural streams from which sufficient water san be diverted during the dry season. So it was a question, in this case, whether the appellee or its consumers should provide the storage necessary to get the full benefit of the water. And in the contract with the appellants, as well as with its own consumers, it has only obligated itself to furnish the water by a continuous flow, leaving the consumer to provide for storing it on his own premises when not needed for actual use.

The evidence shows that the water was only used for irrigation of the grapes "once or twice" a year. Their witness, Mr. Sternenberg, who worked on the ranch, testified to the facts as follows:

"Q. How many times during the year would they irrigate the grapes?

"A. They would irrigate them once or twice, try to—do you mean in any particular year?

"Q. No, I mean generally.

"A. From one to twice.

"Q. During the entire year?

"A. Yes, sir.

"Q. You say the water was running constantly from the flume?

"A. During the irrigating time.

"Q. Only during the irrigating time?

"A. Yes, sir.

"Q. And you didn't take any of your water until you actually wanted to irrigate the grapes or the other fruit?

"A. Yes, sir.

"Q. You had no means of storing the water at all on the ranch?

"A. No."

Record p. 174.

This evidence shows three things, viz: that they only needed water, for actual use, for a very short time, and if they had provided means for storing their water that went to waste, when not needed, they could have had the full benefit of it, and that they simply neglected this necessary precaution to avoid loss during a dry season. They now seek to recover their loss, brought about by their own want of care, from the defendant, who was under no obligation to store and save the water for them. The evidence shows that such storage was necessary.

Mr. Harris, their witness, testifies:

"Q. Suppose they only irrigate their grapes, for instance, twice in a year, if their constant flow of 30 inches during the balance of the year was stored in reservoirs on the ranch, it would add immensely to th practical use of the water, would it would add immensely to the practical use of the water, would it not?

A. Yes, sir; if the company would build storage reservoirs.

"Q. I am talking about the owner on his own ranch?

"A. He would be very fortunate in having a place to store it, otherwise he could not use it.

"Q. Is it not the custom of ranchers now generally to supply reservoirs on their ranches to accumulate the water?

"A. It is getting to be the custom of ranchers on the line of the flume.

"Q. Is it not so everywhere where parties buy their water by constant flow, without accumulation?

"A. Yes, sir; where they buy water under those conditions they have to provide storage.

"Q. Is it not absolutely necessary, in order to get the full benefit of their water, where they are only entitled to it by constant flow?

"A. They have either to provide storage or sit up nights and work Sundays.

"Q. And every day in the year?

"A. Every day in the year."

Record, p. 200-201.

And that other consumers, more thoughtful of their interests, did provide their own storage and thus provided for a dry season.

Record, p. 201.

And the lay of appellants' lands was such that they could have provided such reservoir or reservoirs.

Record, p. 477.

Therefore, if there was any damage to the appellants it was their own fault. With the amount of money they claim they have lost, by being deprived of the water, they could have constructed one or more storage reservoirs that would have prevented any loss at all. And yet they prefer to lose $6,000 a year, from this on, rather than protect themselves in that way. This only proves, more clearly, what we claimed before, that this shortage of water is simply made an excuse for getting rid of this contract and at the same time for avoiding the payment of what they owe for the water and the water right.

The claim for damages is as devoid of merit as the demand for a rescission of the contract.

But there is another unanswerable reason why they cannot recover damages in this action. There is no evidence on which to estimate the damages. Their only evidence of the amount of

damages they sustained is by proof of the supposed quantity of fruit they could have grown if they had had the water, what they did grow without it, and the estimate of witnesses as to the price they could have realized for the fruit they did not raise.

Record, p. 112.

The manager of the ranch testifies that the damage complained of amounted to $6,500 and consisted of damage to the orange and lemon trees and crop of $600, to the grape crop $5,400, shade trees and olive trees $500, and the alfalfa $50. It will be seen, therefore, that almost the entire damage attempted to be shown was by reason of the loss of a crop that it is supposed they would have raised and sold if they had got the water.

But such speculative profits, on a crop that might have been raised, is not the proper basis for fixing damages, for the best of reasons.

Crow v. San Joaquin Canal and Ir. Co., 62 Pac. Rep. 562.

In the case cited, the Superior Court of California said:

"The only evidence offered on the part of the plaintiff as to damages, consisted of testimony that, had he obtained the water, he would have planted a crop of alfalfa, from which he would have realized certain profits, but owing to his failure to get the water, he did not plant it. This evidence was admitted over the objections and exceptions of the defendant; and the court instructed the jury that the plaintiff was entitled to recover, as damages, the profits he would have realized from "the crops of alfalfa that he would have raised on the said land had water been furnished by defendant, as demanded by the plaintiff, less the cost of planting, cutting, and caring for such crops, and less what said land actually produced and netted to plaintiff in the years 1896 and 1897." Herein we think the court was clearly in error. The measure of damages arising from a breach of contract or in tort is the detriment proximately caused thereby. . Civ. Code, Sec. 3333. The rule embodied in the instruction of the court, and under which the

testimony on behalf of the plaintiff was admitted, is too remote and speculative. The proper measure of damages in a case like this is the difference between the rental value of the land with water and its rental value without it, and the lawful price of the water should also be taken into consideration and deducted. If the land had been actually taken from the plaintiff by the defendant during the period in question, the company would have been liable for its rental value only during the time plaintiff was deprived of it. Conjectural profits of the kind sought here cannot be recovered as damages in such cases. They must be damages capable of ascertainment by proof to a reasonable certainty. Uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action. Muldrow v. Norris, 2 Cal. 74, 78; Giaccomini v. Bulkeley, 51 Cal. 260; City of Chicago v. Huenerbein 85 Ill. 594; Pollitt v. Long, 58 Barb. 20, 35. In City of Chicago v. Huenerbein, supra, the action was for damages in flowing water upon plaintiff's land, thereby preventing him from cultivating it. The trial court permitted the plaintiff to prove that, if the land had been planted with potatoes, the ground would have yielded 200 busheds to the acre; that they would have sold at an average of 70 cents a bushel when matured. On appeal the court say: "The rule for the assessment of damages was wrong. In cases of this character the true measure is the fair rental value of the ground which was overflowed, and not the possible or even the probable profits that might have been made had the land not been overflowed. Such damages are too remote and speculative, depending upon too large a variety of contingencies which might never have happened." In this case one of plaintiff's witnesses, and a farmer of experience, testified that even good farmers, in sowing alfalfa "frequently failed to make a stand," and that had frequently happened to himself. The result of the crop would largely depend upon the amount and character of the care it should receive, the condition of the weather, and a variety of other matters entirely uncertain and contingent. In this case it appears that the plaintiff applied for water on August 31, 1896, and was refused. Afterwards, having settled his back indebtedness, he obtained water in the spring of 1897, having been deprived of the water only about eight months. He testified that he had the land for six years, and that, although he had had water all the time for five of thos years, he had never made anything. In fact, after farming it for four years, he

became insolvent. Yet the jury, under the instructions and testimony referred to, estimated that if he had got the water, on this particular occasion, eight months sooner than he did, he would have made a clear profit of $1,091, which was the amount of their verdict. For the foregoing error on the question of damages, the judgment and order denying a new trial are reversed, and a new trial ordered."

This it seems to us is conclusive against their right to recover damages.

But the court below decided the case in favor of the appellee on the unanswerable ground that there was no breach of the contract to supply water, and therefore there was no basis for either the rescission of the contract or the recovery of damages. The undisputed evidence and the express admission in the answer of the appellants to the cross complaint were to the effect that the failure to supply the water resulted from the extreme drought of the year in question. The contract, as we have seen, provided in express terms that if the corporation's supply of water be at any time shortened, or its capacity for delivering the same impaired by the act of God or by the elements or by drought, or the failure of the average amount of rainfall in the mountains, etc., "the above described land and the land to which said fifteen inches of water or any portion thereof may be attached as hereinbefore provided, shall, during the period of such shortage or impairment, be entitled to only such water as can be supplied to and for it after the full supply shall have been furnished to all cities and towns as or may be dependent, either in whole or in part, upon said system of water works for their supply of water for municipal purposes and for the use of their inhabitants." And the contract contained this further provision:

"*And the said party of the first part shall not be responsible for any deficiency of water occasioned by any of the above causes, but the party of the first part shall use and employ all*

due diligence at all times in repairing and protecting its said flume and in maintaining the flow of water therein.'

This latter provision in thecontract is plain and explicit. The evidence, as we have shown, was clearly to the effect that but for the extreme drought the company wuold have been able to furnish a full supply of water. That it did not do so was because of the very fact mentioned in the contract, and with respect to which it was expressly provided the Company should not be responsible. The evidence shows beyond question that every reasonable effort was made by the company to avoid the unexpected drought. It had never failed before to furnish a full supply of water. It would not have failed that year if there had been an average amount of rainfall. The question is a simple one, and we submit was rightly decided by the court below. This court would hardly undertake, under the circumstances, to review this question of fact passed upon by the learned judge of the court below, and reverse the decision on that ground; and after all, it is the only question on this appeal. Or, in other words, if the court below was right on this proposition, then no matter how the other questions raised by counsel might be decided, the decree would have to be affirmed. This is necessarily so, because if there was no breach of contract, there was no ground for a rescission, and none for damages. We may confidently submit this appeal upon this question alone, which, if rightly decided by the court below, is decisive of the appeal.

We respectfully submit that the complainants have shown no defense to the cross complaint and that the defendant is entitled to recover the full amount agreed by the contract to be paid.

Works, Lee & Works,

Counsel for Appellee.